

BEN COLLINS  
v.  
OFFICE OF SURFACE MINING RECLAMATION  
AND ENFORCEMENT

DARYL G. HALE  
v.  
OFFICE OF SURFACE MINING RECLAMATION  
AND ENFORCEMENT

IBLA 85-466  
85-467

Decided July 1, 1986

Notices of appeal/petitions for discretionary review of orders by Administrative Law Judge Joseph E. McGuire dismissing proceedings in NX 5-11-P and NX 5-13-P, respectively, for failure to prepay proposed civil penalties.

Denied.

1. Surface Mining Control and Reclamation Act of 1977:  
Administrative Procedure: Generally -- Surface Mining Control  
and Reclamation Act of 1977: Civil Penalties: Generally

A document styled as an "application for review" filed within 30 days of receipt of a proposed assessment of a civil penalty will not be considered an application for review of a notice of violation or cessation order where the record shows the person filing the document was served with the notice of violation or cessation order more than 30 days prior to the filing; however, the document may be considered to be a petition for review of a proposed civil penalty.

2. Surface Mining Control and Reclamation Act of 1977: Civil  
Penalties: Generally -- Surface Mining Control and Reclamation  
Act of 1977: Civil Penalties: Prepayment

Under sec. 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(b), a petition for review of a proposed civil penalty must be accompanied by full payment of the proposed assessment. Timely prepayment of the

amount of the civil penalty by one seeking review is essential to establish the jurisdiction of the Hearings Division to hear the petition for review or the Board of Land Appeals to entertain a petition for discretionary review.

APPEARANCES: Forrest E. Cook, Esq., Whitesburg, Kentucky, for appellants;  
R. Anthony Welsh, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE HARRIS

On March 20, 1985, Ben Collins and Daryl G. Hale each filed a "notice of appeal" from separate orders issued by Administrative Law Judge Joseph E. McGuire, dated February 15, 1985, dismissing the petitions for review filed by Collins and Hale, respectively. <sup>1/</sup> The basis for the orders was each petitioner's failure to prepay the amount of a proposed civil penalty, as required by section 518(c) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(c) (1982), and 43 CFR 4.1152(c).

#### Procedural and Factual Background

On July 14, 1981, Office of Surface Mining Reclamation and Enforcement (OSM) reclamation specialist Charles M. Saylor inspected a wildcat mine site in Letcher County, Kentucky, and issued Notice of Violation (NOV) No. 81-2-111-16. Elmer Collins, Oscar Donnelly, Daryl Hale, and Ben Collins all were named in the NOV, with Hale and Ben Collins being described as "equipment owners." Saylor wrote on the face of the NOV that Ben Collins refused to sign the NOV. On January 25, 1982, Saylor issued Cessation Order (CO) No. 82-2-111-2, for failure to abate NOV No. 81-2-111-16. Again all four individuals were named. The record contains a certified mail return receipt card showing service of that order on Hale on February 22, 1982.

In August 1984 OSM issued a notice of proposed assessment of penalty of \$14,400 with respect to NOV No. 81-2-111-16, and a notice of proposed assessment of penalty of \$112,500 with respect to CO No. 82-2-111-2. On December 21, 1984, Hale and Ben Collins filed with the Hearings Division, Office of Hearings and Appeals, separate documents each styled as an "application for review." <sup>2/</sup> Both Hale and Collins denied being served with the NOV or CO. They denied being engaged in surface coal mining at the site or

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<sup>1/</sup> Because of the similarity of facts and issues the "appeals" of Collins and Hale, IBLA 85-466 and IBLA 85-467, respectively, have been consolidated for decision.

<sup>2/</sup> The Hearings Division described these cases as "individual civil penalty cases" and gave them the "-P" designation used for petitions for review of civil penalties.

owning any equipment in use at the site. They admitted however, being served with both proposed assessments on November 21, 1984. 3/

In motions dated February 7, 1985, OSM noted the "applications" were incorrectly docketed as individual civil penalties, stated the "applications" were really petitions for review of proposed civil penalties, and moved to dismiss for failure to prepay the proposed amounts in accordance with 43 CFR 4.1152. In separate orders granting OSM's motions, Judge McGuire construed, without comment, the "applications" as petitions for review of the proposed civil penalty assessment and dismissed each of them for failure to prepay. On the same day counsel for Hale and Collins placed in the mail separate, but nearly identical, responses to OSM's motion. Therein, counsel noted the actions had been incorrectly docketed as civil penalty proceedings, rather than applications for review, and that such applications were appropriate since the first notice of the NOV and CO were the proposed assessments received in November 1984. Counsel for Hale and Collins repeated these same arguments in the "notices of appeal" filed with the Board.

After reviewing the record in this case and the "notices of appeal," the Board issued an order on April 1, 1985, calling on the parties to address the issue of the nature of the proceedings. The Board stated:

The resolution of the disagreement as to the nature of these proceedings will not only determine whether Judge McGuire was correct in dismissing for failure to prepay, but will also control this Board's treatment of these "appeals." Collins and Hale do not dispute that they have not prepaid the amount of the proposed civil penalties. Thus, if the matter is a civil penalty proceeding, the Board would almost certainly construe the "notices of appeal" as petitions for discretionary review and deny them, as prepayment is essential to establish the Board's jurisdiction in civil penalty matters. On the other hand, if the matter is actually an application for review, the parties would have an appeal of right of Judge McGuire's order of dismissal, regardless of the failure to prepay, and briefing might be required.

In response to the order, counsel for Hale and Collins filed briefs setting forth identical arguments for each. First, counsel asserts Judge McGuire erred by entering his order without allowing the time to respond to motions accorded by 43 CFR 4.1112(b). Second, counsel charges the NOV and CO were not properly served on either Hale or Collins and their first notice of OSM action was the service on November 21, 1984, of proposed assessments. Hale and Collins are allowed 30 days from initial service of charges in which to seek review in accordance with 43 CFR 4.1160, counsel asserts. The fact the

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3/ Actually, the Hale "application" states he received the proposed assessments on Nov. 20, 1984; however, in subsequent pleadings he asserts the service date to be Nov. 21, 1984.

first notice Hale and Collins received of the alleged violations was the proposed assessment, counsel argues, should not negate their right to review. Finally, counsel contends that the fact the applications were misdocketed as petitions for review of civil penalties should not prejudice the right to review.

In its response to the order OSM argues that Hale and Collins did not file timely applications for review, that their documents must be considered petitions for review, and because they were not accompanied by prepayment of the civil penalty neither the Administrative Law Judge nor the Board has jurisdiction to entertain the petitions. OSM submitted numerous documents in support of its position.

### Discussion

[1] We will first examine the question of whether the "applications for review" of Hale and/or Collins were timely filed. The record shows that on July 14, 1981, the Circuit Court of Franklin County, Kentucky, issued an order naming Oscar Donnelly, Elmer Collins, Daryl Hale, and Ben Collins and declaring they were "temporarily restrained and enjoined from any mining activities on lands located near Beaver Dam Creek near Colsum, Kentucky on which defendants are conducting strip mining activities without a permit" (OSM Response, Exh. C). OSM represents the site described in that order is the one involved herein (OSM Response, Exh. A). That representation was not denied by Hale or Collins. Saylor stated in an affidavit (OSM Response, Exh. A) that on the day he issued the NOV he discussed it in detail with Ben Collins, who refused to accept or sign it, and he then nailed it to a trailer being used as an office on the mine site. Saylor further stated he had determined Collins was a proper party for service through investigation of records of the Kentucky Department of Natural Resources. A check of state records also revealed Hale was a partner with Collins in the mining activities, Saylor stated.

Service of the CO was attempted, Saylor reported, by sending a copy to each of the four individuals by certified mail, return receipt requested. Hale signed his receipt on February 22, 1982. Saylor states OSM records do not contain certified mail receipts for any of the others, although he represents that copies of the CO were sent to each by first class mail, and none were returned.

OSM states that in August 1983 it sued, inter alia, the four individuals named in the NOV and CO in United States Federal District Court, Eastern District of Kentucky, in an effort to get the site in question reclaimed. OSM asserts separate answers to that complaint were filed by Hale and Collins, through common counsel, and that such counsel is Forrest Cook, the counsel for Hale and Collins herein. This assertion is not denied by Hale and Collins. OSM further represents in its response at pages 5 and 6:

On March 9, 1984, in response to a request by Hale for production of documents, OSM served upon his attorney in fact,

Forrest Cook, copies of Notice of Violation No. 81-2-111-16, and Cessation Order No. 82-2-111-2 (Ex. E, para. 4). On May 3, 1984, OSM took the deposition of Hale (Ex. C). In his deposition, Hale, when shown a copy of the NOV and CO and questioned about having received them stated: "I'm not saying they didn't mail me one, but I don't remember receiving it" (Ex. D, at 71). In that same deposition he stated that he is the sole owner and director of Rainbo Valley Corp. and also its president (at 63-62). Rainbo Valley Corp. had a dozer and a front-end loader on the site (at 63-80). He did some work at the site but it was to construct a house site (at 66). His work lasted between six and eight weeks (at 80). And, the Kentucky Department for Natural Resources and Environmental Protection Cabinet had filed an action against him along with Ben Collins and others over the same site as the one that was the subject matter of the OSM law suit (at 101, 102).

The assertion by Hale and Collins that service of the proposed assessment in November 1984 was their "first notice of OSM action" must be rejected out-of-hand as ludicrous. The record shows Collins and Hale were involved in a wildcat strip mining operation that both the State of Kentucky and OSM were attempting to halt. After a review of the record, we accept Saylor's statement that he discussed the NOV with Collins on July 14, 1981, and that Collins refused it. Thus, service of the NOV on Collins must be considered to have been completed at that time. See 30 CFR 722.14(a)(1). The record shows service of the CO on Hale on February 22, 1982. Even assuming a total failure to serve the NOV and CO on Hale and Collins in 1981 or 1982, it must be concluded that service of copies of those documents on their common counsel on March 9, 1984, as part of OSM's response to a request for production of documents filed in the United States District Court proceeding, cured any defects in the prior service and provided Hale and Collins with notice sufficient to satisfy the service requirements of the Act and regulations. 4/ Thus, viewing the record in the light most favorable to Hale and Collins, they had 30 days from receipt by their counsel of copies of the NOV and CO to file applications for review of those enforcement actions. They failed to do so; therefore, their attempt to file such applications in December 1984, following receipt of the proposed assessments, was untimely. 5/ Such filings

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4/ In Nebesna Native Corp. (On Reconsideration), 83 IBLA 82 (1984), the Board recognized the principle of notice based upon actual knowledge. Therein, the Board held BLM's failure properly to serve its decision on the affected party was cured by the fact that the authorized agent of the party had actual knowledge of the decision. See Village & City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984), modified on other grounds, Eugene M. Witt, 90 IBLA 265 (1986).

5/ By failing to file timely applications Hale and Collins waived their opportunity to challenge the fact of the violations in the NOV and CO in a 43 CFR 4.1160 review proceeding. Such a waiver, however, did not preclude them from making such a challenge in a civil penalty proceeding, subject to

were efficacious, if at all, only as petitions for review of a proposed civil penalty. However, because such filings were not accompanied by prepayment of the proposed civil penalty, they were required to be dismissed.

[2] The Department has consistently held that prepayment is essential to establish the jurisdiction of both the Hearings Division to hear a petition for review and of the review board to entertain a petition for discretionary review. 30 U.S.C. § 1268(c) (1982); 30 CFR 723.19(a) and 845.19(a); 43 CFR 4.1152(b) and (c); Tri Coal Co. v. OSM, 85 IBLA 146 (1985); Comet Mining Corp. v. OSM, 4 IBSMA 122 (1982); David Excavating Co., 4 IBSMA 2 (1982); C & K Coal Co., 1 IBSMA 118, 86 I.D. 221 (1979). <sup>6/</sup> We held as follows in Tri Coal Co. v. OSM, *supra* at page 148:

Section 518(c) of SMCRA [30 U.S.C. § 1268(c) (1982),] provides that a person charged with a civil penalty has 30 days from being informed of the proposed amount "to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to [the Department] for placement in an escrow account." This provision has been implemented at 30 CFR 723.19(a) and 845.19(a) and 43 CFR 4.1152(b). The latter regulation provides: "The petition [for review of the proposed civil penalty] shall be accompanied by full payment of the proposed civil penalty." 43 CFR 4.1152(c) provides: "As required by section 518(c) of the act, failure to make timely payment of the proposed assessment in full shall result in a waiver of all legal rights to contest the violation or the amount of the penalty." [Emphasis supplied.]

We find Hale and Collins failed to file timely applications for review. Their filings were timely, if at all, as petitions for review. As petitions, however, the filings were fatally defective for failure to include prepayment. We conclude Judge McGuire properly dismissed those filings as petitions for review. The claim of counsel for Hale and Collins that the Judge erred in failing to await his filing of responses to OSM's motions to dismiss is of no

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fn. 5 (continued)

the prepayment requirement of section 518(c) of the Act, 30 U.S.C. § 1268(c) (1982).

<sup>6/</sup> We note that three Federal courts of appeals have upheld the prepayment requirement against constitutional challenges. Graham v. OSM, 722 F.2d 1106 (3rd Cir. 1983); Blackhawk Mining Co. v. Andrus, 711 F.2d 753 (6th Cir. 1983); and B & M Coal Corp. v. OSM, 669 F.2d 381 (7th Cir. 1983). The United States District Court for the Northern District of Alabama, Southern Division, ruled, however, in United States v. Camp Coal Co., No. 85-AR-2117-S (N.D. Ala. Feb. 20, 1986), that OSM had waived prepayment in that case, and even if it had not waived it, prepayment is a violation of procedural due process.

consequence because the record before the Judge disclosed the lack of prepayment. Thus, he was justified in acting as he did immediately to dismiss the cases, since he had no jurisdiction to entertain the petitions.

The "notices of appeal" filed with this Board must be considered petitions for discretionary review and must be denied for the reasons set forth above.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for discretionary review are denied.

Bruce R. Harris  
Administrative Judge

We concur:

Franklin D. Arness  
Administrative Judge

R. W. Mullen  
Administrative Judge.

